89-1298

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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempts a state common law claim that an employer has unlawfully discharged an employee in order to interfere with his attainment of benefits under an ERISA-covered benefit plan.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the court below were: Perry McClendon and the Ingersoll-Rand Company.*

* Ingersoll-Rand Company has an interest in the following corporate entities and partnerships: Dresser-Rand Company; Dresser-Rand Machinery; Dresser-Rand Italia; Dresser-Rand S.A.; Dresser-Rand Canada, Inc.; Dresser-Rand Compression Services S.A.; Dresser-Rand Service Personnel B.V.; Dresser-Rand Japan Ltd.; Dresser-Rand B.V.; Turbodyne S.A. de C.V.; Dresser-Rand Singapore Pte. Ltd.; Dresser-Rand de Venezuela S.A.; Dresser-Rand GmbH; Kongsberg Dresser Power, Inc.; Kongsberg Dresser Power Pte. Ltd.; KDP Commercio E. Industrial Ltd.; Kongsberg Dresser Power A/S; Dresser-Rand Holding Company; Dresser-Rand Overseas Sales Company; Dresser-Rand Sales Company, S.A.; Southwest Industries, Inc.; Turbodyne Electric Power Co.; Tepco/Pembroke Power, Inc.; Dresser-Rand U.K. Ltd.; Dresser-Rand Service S.a.r.e.; Norton/Torrington Ceramic Bearings Company; Nastach, Inc.; Ingersoll-Rand (India) Limited; and Niject Services Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Ingersoll-Rand Company respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App., *infra*, at 1a-16a) is reported at 779 S.W.2d 69. The opinion of the Court of Appeals of Texas (App., *infra*, at 17a-24a) is reported at 757 S.W.2d 816. The opinion of the district court granting summary judgment for petitioner (App., *infra*, at 25a-26a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on October 18, 1989. A timely motion for rehearing was denied on November 15, 1989. App., *infra*, at 27a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 502 of ERISA, 29 U.S.C. § 1132, provides in pertinent part:

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

* * * *

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Section 510 of ERISA, 29 U.S.C. § 1140, provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Section 514 of ERISA, 29 U.S.C. § 1144, provides in pertinent part:

> (a) Supersedure; effective date
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> * * * *
>
> (c) Definitions
>
> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

STATEMENT

1. Petitioner, Ingersoll-Rand Company, hired respondent, Perry McClendon, in August 1972 as a salesperson and distributor of construction equipment. App., *infra*, at 1a-2a. At the time, petitioner provided respondent with a "Compensation Arrangement" that detailed the commissions that respondent would earn on any sales made during the course of the next year. *Id.* at 2a, 18a, 19a. Respondent also participated in petitioner's employee benefit plans, including its pension plan. *Id.* at 2a, 18a.

Respondent thereafter performed for petitioner in a generally satisfactory manner. App., *infra*, at 2a. When the market for construction equipment declined in the fall of 1982, however, petitioner terminated respondent in a reduction-in-force. *Id.* at 2a, 24a. At the time of his termination, respondent had accumulated nine years and eight months of actual service with petitioner. *Id.* at 2a, 18a. Respondent believed that, as a consequence, he was four months shy of the service credits necessary for vesting under petitioner's pension plan. *Id.* at 2a, 18a, 24a.

2. Respondent thereafter initiated suit against petitioner in state court for wrongful discharge. App., *infra*, at 2a & n.2. Respondent claimed that petitioner had breached a contract of employment and a duty of good faith and fair dealing in connection with the employment relationship. *Id.* Respondent further claimed that, even though he had actually vested in his pension benefits, petitioner had terminated him in order, among other things, to prevent him from vesting under the pension plan. *Id.* The trial court rendered summary judgment in favor of petitioner. *Id.* at 25a-26a.

3. The court of appeals affirmed. App., *infra* at 17a-24a. It initially held (*id.* at 20a-22a) that the "Compensation Agreement" in no way limited the circumstances in which petitioner could dissolve its employment relationship with respondent. It further held (*id.* at 22a-24a) that, under Texas law, no covenant of good faith and fair dealing is implied in the employment relationship. Finally, it rejected respondent's claim that he had been discharged for an illicit reason, finding (*id.* at 24a) that respondent had "incorrectly concluded that being discharged before ten years of service would prevent him from collecting certain benefits," and that petitioner "did nothing more than react to an economic downturn by reducing its sales force."

4. In a 5-4 decision, the Supreme Court of Texas reversed and remanded. App., *infra*, at 1a-16a. It declined to address respondent's claim that a duty of good faith and fair dealing should be implied into the employment relationship between petitioner and respondent. *Id.* at 2a, n.1. Instead, it held that a cause-of-action lies under Texas common law against an employer whose "principal reason" for terminating an employee is to avoid contributing to or paying benefits under the employee's pension fund. *Id.* at 1a, 5a. In reaching this conclusion, the court expressly held that Section 514 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, did not preempt the state law cause of action recognized by the court. *Id.* at 5a n.3.

a. The majority of the Supreme Court of Texas began by noting (App., *infra*, at 3a) that, while "Texas courts have traditionally followed the employment at-will doctrine," they have placed "numerous exceptions . . . on its application." The majority explained (*id.* at 4a) that many states, including Texas, "have accepted the principle that public policy can limit an employer's power to discharge at-will employees." Specifically, it pointed out (*id.* at 4a-5a) that the United States District for the Eastern District of New York, construing New York law, "has recognized a cause of action for wrongful discharge when an employee alleges that he was terminated to deprive him of pension benefits."

The majority next found (App., *infra*, at 5a) that the State of Texas "has an interest in protecting employees' interests in pension plans." In support of this conclusion, the court cited (*id.* at 5a) both a Texas statute (Tex. Rev. Civ. Stat. Title 110B), which provides pensions for public employees, and Section 510 of ERISA, 29 U.S.C. § 1140, which makes it unlawful for an employer, among other things, to discharge an employee "for the purpose of interfering with the attainment of any right to which such participant may become entitled" under a pension plan. Indeed, the majority stated

(App., *infra*, at 5a) that "[t]he very passage of ERISA demonstrates the great significance attached to income security for retirement purposes."

The majority then concluded (App., *infra*, at 5a) that "public policy favors the protection of integrity in pension plans and requires in this case an exception to the employment at-will doctrine." Specifically, it held that (*id.* at 5a) an employee should be "allow[ed] recovery when [he] proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." In so concluding, the majority conceded (*id.* at 5a, n.3) that there are cases holding "that a claim for wrongful discharge in order to avoid the payment of pension funds is preempted by ERISA." But the majority determined (*id.* (emphasis in original)) that these cases are distinguishable because respondent "is *not* seeking lost *pension benefits* but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge."

b. Justice Cook, joined by Chief Justice Phillips and Justice Hecht, filed a dissenting opinion. App., *infra*, at 6a-13a. Justice Cook agreed with the majority (*id.* at 6a) that "ERISA demonstrates the great significance attached to income security for retirement." Nonetheless, he found it even more significant (*id.*) that ERISA "confers upon employees a federal version of the cause of action created by this court, confines litigation of the federal cause of action to the federal courts, and preempts the state cause of action." Specifically, he found (*id.* at 7a) that, under Section 514(a) of ERISA, "all provisions of the subchapter in which § 510 is contained preempt state laws that 'relate to' employee benefit plans," and that "[t]here can be no doubt that the law created today by [the majority] relates to a pension plan and directly conflicts with the specific provisions of § 510 establishing a federal cause of action under ERISA." Justice Cook

also objected (*id.* at 9a) to "the confusion and prolonged litigation we have thrust upon employers and employees in their efforts to resolve disputes concerning their pension plans." [1]

c. Justice Gonzalez also dissented. App., *infra*, at 13a-16a. He agreed with Justice Cook's conclusion (*id.* at 13a) that "this cause of action is preempted by ERISA." He further found (*id.* at 14a-16a) that "the federal authority that the court finds persuasive is questionable," and noted that other courts have refused to follow it.

REASONS FOR GRANTING THE PETITION

This case raises important issues concerning the application of ERISA's preemption provision to a state law that makes it unlawful for an employer to discharge an employee for the purpose of interfering with the attainment of benefits under an ERISA-covered employee benefit plan. The court below narrowly construed ERISA to preempt only state law claims for pension benefits. As other federal and state courts have recognized, however, Section 510 of ERISA regulates the employment relationship in order to preserve employee rights under ERISA-covered plans, and Section 514 of ERISA preempts state laws that attempt to do the same. Although this Court has previously addressed related issues, *see, e.g., Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987) (preemption of state common law action asserting improper processing of disability benefits claim); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (preemption of state human rights law forbidding discrimination in employee benefits on the basis of pregnancy); *Alessi v. Raybestos-*

[1] In the remainder of his dissent, Justice Cook argued (9a-13a) that the majority's decision had made summary judgment essentially unavailable in cases alleging discharge to interfere with attainment of pension benefits, and that respondent had similarly erred in asking that an implied covenant of good faith and fair dealing be implied into the employment relationship.

Manhattan, Inc., 451 U.S. 504 (1981) (preemption of state statute prohibiting offsets of workers compensation benefits against pension benefits), it has not directly addressed the precise issue presented here. The need for prompt guidance from this Court is compelling, since the state and federal courts are sharply divided over this ERISA preemption question, and since the resulting multiplicity in rules and laws regulating employers and their benefit plans is fundamentally at odds with the purpose of ERISA's expansive preemption provision—*i.e.*, to establish a single, comprehensive scheme for regulating benefit plans and employer conduct with respect thereto. Accordingly, this Court's immediate review is necessary.

I. THE DECISION BELOW CONFLICTS WITH FEDERAL AND STATE COURT DECISIONS HOLDING THAT ERISA PREEMPTS A STATE LAW CLAIM THAT AN EMPLOYER HAS WRONGFULLY DISCHARGED AN EMPLOYEE IN ORDER TO INTERFERE WITH THE ATTAINMENT OF BENEFITS UNDER AN ERISA-COVERED EMPLOYEE BENEFIT PLAN

As the majority opinion below notes (App., *infra*, at 4a-5a), the Supreme Court of Texas is not alone in holding that ERISA does not preempt a state law claim that an employer has wrongfully discharged an employee in order to interfere with the attainment of benefits under an ERISA-covered employee benefit plan. *See, e.g., Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 826 (E.D.N.Y. 1980); *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554, 557-58 (E.D.N.Y. 1981) (relying on *Savodnik* in recognizing a state law wrongful discharge claim); *cf. KMart Corp. v. Ponsock*, 732 P.2d 1364, 1373 (Nev. 1987) (approving compensatory and punitive damages award under state law for wrongful discharge based on claim that employer discharged employee in order to avoid paying retirement benefits). These decisions, how-

ever, directly conflict with the overwhelming weight of judicial authority in the federal and state courts on this issue.

In *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir. 1989), the First Circuit held that ERISA preempted a state law claim that an employer had wrongfully discharged an employee in order to prevent the employee's beneficiary from collecting benefits under the employer's ERISA-covered health benefits plan. The court noted (882 F.2d at 587-88) that, under Section 514(a) of the statute, "ERISA specifically preempts most state laws that 'relate to' plans covered under ERISA." The court then concluded (*id.* at 588) that, "[n]ot only does [plaintiff's] claim 'relate to' a plan covered under ERISA and thus become preempted under ERISA's preemption clause, but a specific provision of the Act creates a similar cause of action that protects an employee from wrongful interference by the employer." The court explained (*id.*) that:

> [Plaintiff's] complaint is grounded upon Codex's alleged wrongful motivation in terminating his employment: to avoid payment under an ERISA plan to [plaintiff's] former wife. This claim has much more than the requisite "connection or reference" to an ERISA plan (citation omitted). Its focus is Codex's interference with alleged benefit rights. This is precisely the type of action that section 510 sought to cover and that is essential to the Act's protection.

The Third Circuit reached an identical conclusion in *Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989). In *Pane*, an employee sued his employer for compensatory and punitive damages under ERISA and New Jersey law, alleging that the employer had discriminated against him for the purpose of preventing his eligibility for severance pay and to retaliate against him for seeking severance pay. 868 F.2d at 633. The Third Circuit, however, held (*id.* at 639) that the employee's "state law

claims were properly dismissed because they are preempted by ERISA." *See also id.* at 634, 635.

Similarly, in *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987), the Ninth Circuit held that ERISA preempted a state law claim that an employer had wrongfully discharged an employee in order to prevent him from acquiring retirement benefits under its employee benefits plan. In *Sorosky*, the question on appeal concerned whether the suit had properly been removed from state court to federal court. 826 F.2d at 798-799. The Ninth Circuit held that, under this Court's decision in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), a state law claim is removable where preempted by ERISA, and that the employee's state law claim was in fact preempted by ERISA. 826 F.2d at 799. The court reasoned (*id.* at 799-800):

> The preemption issue seems clear to us . . . . In substance, Sorosky alleges that Burroughs agreed in writing to provide him with monthly retirement benefits and then sought to prevent him from acquiring those benefits. To the extent that this first claim refers to the employee benefit plan, it is preempted . . . .
>
> Sorosky's third claim, for breach of the duty of good faith and fair dealing, and his fourth claim, alleging conspiracy to interfere with a protected property interest, for the most part incorporate the allegations made in the first claim. Therefore, the third and fourth claims are preempted to the same extent as the first claim.
>
> * * * *
>
> Sorosky . . . had a federal claim under section 502(a)(3) to enforce his right under section 510 to non-interference with his employee benefits . . . . The allegations in Sorosky's complaint that relate to the employee benefit plan state a claim under, and are therefore within the scope of, section 502(a)(3)[,] even if that section does not provide the en-

> tire remedy that Sorosky seeks in his complaint. These claims are thus so completely preempted as to state a claim arising under federal law (citation omitted).

The Eighth Circuit, in *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 and 454 U.S. 1084 (1981), adopted similar reasoning in finding that ERISA preempted state law tort claims based on alleged interference with benefit rights. In *Dependahl*, three executives were terminated after a change in corporate control, and brought suit alleging tortious interference with their rights under severance pay and life insurance plans. 653 F.2d at 1210-1211. After a non-jury trial, the district court granted judgment in favor of the executives on their state law claims. *Id.* at 1211. The Eighth Circuit reversed (*id.* at 1215-1216), relying on Sections 510 and 514(a) of ERISA:

> The thrust of the former executives' argument against federal preemption of the state tortious interference with contract cause of action focuses on the lack of substantial damage such a cause of action would have on the overall purpose of ERISA. This argument, however, misses the point. If Congress has already provided a remedy for the violation of the former executives' benefit plans, then once Congress has expressed its intention to occupy the field, the state law is preempted, regardless of whether or not a conflict exists which involves a direct interference by the state law with the substantive federal legislation. Here, Congress has provided a remedy for the wrong allegedly done the former executives . . . .

The Supreme Court of West Virginia reached the same conclusion when it was confronted with this ERISA preemption question. In *Conaway v. Eastern Associated Coal Corp.*, 358 S.E.2d 423 (W. Va. 1986), a former employee sued his former employer for wrongful discharge under state law, alleging that the employer had tortiously

discharged him to prevent both the vesting of his pension rights and his eligibility for benefits under a long-term disability plan. The Supreme Court of West Virginia affirmed summary judgment for the employer, holding that such state law tort claims are "preempted by Federal ERISA law, *see* 29 U.S.C. § 1001 *et seq.* (1982), and such action is illegal under 29 U.S.C. § 1140 (1982)." 358 S.E.2d at 427.

In short, contrary to the decision below, four federal courts of appeals and one state supreme court have held, by reference to Sections 510 and 514(a) of ERISA, that federal law preempts a state law wrongful discharge claim where the employee alleges that the employer has acted for the purpose of interfering with attainment of rights under an ERISA-covered employee benefit plan.[2] Only this Court can resolve this conflict.

II. THE EXTANT JUDICIAL CONFLICT DESTROYS THE UNIFORMITY AND EXCLUSIVITY OF ERISA AND INAPPROPRIATELY BURDENS THE MAINTENANCE OF ERISA-COVERED BENEFIT PLANS

The judicial conflict on this ERISA preemption question warrants this Court's immediate review. Rule 10.1

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[2] While the Fourth, Fifth, Seventh, and Tenth Circuits have not addressed the issue, various district courts in these circuits have held, in contrast to the decision below, that ERISA preempts a state law claim that an employer wrongfully discharged an employee to prevent the vesting of pension benefits under an ERISA-covered plan. *See, e.g., Pratt v. Delta Air Lines, Inc.*, 675 F. Supp. 991, 999 (D. Md. 1987); *Rose v. Intelogic Trace, Inc.*, 652 F. Supp. 1328, 1330-31 (W.D. Tex. 1987); *Wray v. J. C. Penney Co.*, No. 85-2629-S (D. Kan. July 29, 1986) (LEXIS, Genfed library, Dist. file), at 2; *Maxfield v. Central States Health, Welfare & Pension Funds*, 559 F. Supp. 158, 160 (N.D. Ill. 1982). The decision below also conflicts with the Sixth Circuit's reasoning that ERISA preempts a state law claim that an employer has wrongfully terminated an employee in retaliation for the performance of duties under ERISA. *See Authier v. Ginsberg*, 757 F.2d 796, 800-801 (6th Cir. 1975), *cert. denied*, 474 U.S. 888 (1985).

(b) of the Rules of this Court makes clear that the presence of a conflict between a federal court of appeals and the highest court of a state counsels in favor of certiorari review. *See also Andresen v. Maryland*, 427 U.S. 463, 470 n.5 (1976); *Lakeside v. Oregon*, 435 U.S. 333, 336 & n.3 (1978). The need to resolve such a conflict is especially apt in the ERISA context, where "Congress intended to depart from its previous legislation that 'envisoned the exercise of state regulation over pension funds' and meant to establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 523 (citation omitted). Allowing the extant judicial conflict to persist will seriously undermine the concerns for uniformity and exclusivity that motivated the enactment of ERISA's preemption provision.

In 1974, Congress determined that, with exceptions not relevant to this case, the field of employee benefits, especially pension plans, should not be subject to state regulation. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 96-100, 104-106. Congress was particularly concerned with the substantial administrative burdens that conflicting or inconsistent state or local regulation would impose on such plans. *Id.* at 105 & n.25. *See also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-10 (1987). It was also concerned that multiple rules and regulations would discourage employers from providing employee benefits. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 105 n.25; *see also Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 10. Accordingly, it enacted ERISA's "virtually unique pre-emption provision" to ensure that all regulation of the field of employee benefits would be a matter of exclusive federal concern. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983); *see also Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 46.

Permitting the above-referenced judicial conflict to persist would disrupt this exclusive federal scheme. Individual states would be free to prescribe different substantive standards for employer conduct, so that conduct by the employer that was lawful under Section 510 of ERISA might simultaneously be unlawful under the law of the particular state where the affected employees worked or resided—resulting in the very patchwork quilt of inconsistent regulation that Congress sought to avoid through ERISA's preemption provision.[3] Likewise, some states would be free to prescribe their own procedural frameworks for the enforcement of these rights, even though ERISA establishes a uniform federal enforcement scheme, *see* 29 U.S.C. § 1132; thus, exhaustion of internal claims and appeal procedures and the manner of trial (by judge or jury) could vary from the rules adopted by the federal courts. *Compare Dale v. Chicago Tribune Co.*, 797 F.2d 458, 466 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) (requiring exhaustion of internal claim and appeal procedures in ERISA cases), and *Pane v. RCA Corp.*, 868 F.2d 631, 635-637 (3d Cir. 1989) (trial by judge in ERISA cases), *with KMart Corp v. Ponsock*, 732 P.2d 1364 (Nev. 1987) (jury trial without any exhaustion efforts). Finally, states would be free to prescribe their own array of remedies for violations of these

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[3] Under the decision below, for example, the employer's decision is unlawful if "the principal reason" for it is the employer's "desire to avoid" paying benefits. App., *infra*, at 5a. It is unclear what this formulation will come to mean in the Texas state courts and, more importantly, how that standard compares to the federal case law standard. *See Gavalik v. Continental Can Co.*, 812 F.2d 834, 851-853 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987); *Nixon v. Celotex Corp.*, 693 F. Supp. 547, 555 (W.D. Mich. 1988); *Nemeth v. Clark Equipment Co.*, 677 F. Supp. 899, 906 (W.D. Mich. 1987). Moreover, under the decision below (*see* App., *infra*, at 5a), an employer's desire to avoid *contributing to* the pension fund would be a violation of Texas law, even if the employer's purpose was not to interfere with the attainment of benefits—a gross variance from the substantive requirements of ERISA Section 510 and a clear invasion of the separate funding requirements of ERISA.

rights, even though ERISA's comprehensive remedial scheme for Section 510 violations might not allow one or more of those remedies (such as punitive damages). *Compare Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987) (no punitive damages under ERISA), *with KMart Corp. v. Ponsock*, *supra* (compensatory and punitive damages awarded).

The multiplicity and inconsistency of such regulation would impose on employers and their benefit plans precisely the burdens that Congress intended for ERISA's broad preemption provision to avoid. Contrary to congressional intent, it would tend to discourage the establishment and maintenance of employee benefit plans. Employer conduct, such as termination of an employee's employment, otherwise unquestionable in the absence of an employee benefit plan would instantly become subject to suspicion and challenge under state law if the employer's action interfered with the attainment of an employee's benefits under an employee benefit plan. Moreover, state regulation of such employer conduct would impose a financial burden on the plans themselves. An employer with an employee benefit plan, knowing that its employment decisions would be subject to suspicion and challenge under state law, would tend to modify its conduct —for example, refrain from discharging an employee merely because a person is close to vesting in a pension— so that more employees would get greater employee benefits than they would otherwise have received. Finally, state regulation of such employer conduct would impair the ability of an employer effectively and efficiently to manage its business, imposing costs on the production process that Congress intended to avoid in ERISA.

It is true, of course, that Section 510 itself imposes some of these burdens on employers and their plans. But, in enacting Section 510, Congress carefully fashioned the substantive rights, the procedures, and the available remedies so that the burdens thereby created would be tolerable when balanced against the protections afforded

employees. *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 52-57. The same cannot be said for whatever variant of Section 510 a state might choose to impose. A state cause-of-action imposing a different substantive standard of conduct, with a different burden of proof, as well as jury trials and punitive damages, obviously would increase the burdens on employers and their plans. It would, as Justice Cook noted in dissent below (App., *infra*, at 9a), merely produce "confusion and prolonged litigation between employers and employees in their efforts to resolve disputes concerning pension plans"; indeed, variant state causes-of-action would create intolerable confusion, cost, and uncertainty in the administration benefit programs and the resolution of claims. Thus, this Court's immediate review is necessary to resolve the judicial conflict and eliminate these adverse consequences.

III. THE COURT BELOW ERRED IN CONCLUDING THAT ERISA DOES NOT PREEMPT A STATE COMMON LAW CLAIM THAT AN EMPLOYEE HAS BEEN WRONGFULLY DISCHARGED TO PREVENT HIS VESTING IN PENSION BENEFITS

On the merits, the court below plainly erred in its construction of ERISA's preemptive scope. ERISA preempts a state common law claim that an employer has unlawfully discharged an employee in order to prevent him from vesting in pension benefits.

A. A State Law Claim That An Employer Has Interfered With The Attainment Of An Employee's Benefits "Relates To" An Employee Benefit Plan And Is Therefore Preempted

ERISA's pre-emption provision is "deliberately expansive." *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 46. As noted above, it aims to make "pension plan regulation . . . exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 523. Thus, by the terms of Section 514(a), "the provisions of [ERISA] . . . supersede any and all State laws insofar as they

may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a).

A state law that bars an employer from discharging an employee in order to prevent his vesting in pension benefits plainly "relate[s] to" an employee benefit plan within the meaning of Section 514(a). As this Court has repeatedly stated, a "law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 96-97. *See also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (citation omitted). A claim of discharge to prevent vesting in a pension plan clearly has such a "connection" and "reference": The claim requires proof that the employer's actual purpose in terminating the employee revolved around an employee benefit plan, and, as the Supreme Court of Texas noted (App., *infra*, at 5a), is expressly designed to "protect[] employees' interests in pension plans." Indeed, litigation of the claim would, in many instances, require examination of the terms of the plan in order to understand how the employer's action interfered with the attainment of a benefit under it.

That such a state law claim "relates to" a benefit plan within the meaning of Section 514(a) is confirmed by the remaining language of the preemption provision. This language makes it plain that it is the "provisions of this subchapter"—*i.e.*, the subchapter in which Section 514(a) appears—that preempt state laws relating to benefit plans. 29 U.S.C. Section 1144(a). Section 510 of ERISA is one of the provisions of that subchapter. By so incorporating Section 510 into the terms of Section 514(a), Congress made it clear that claims concerning "interference" with the attainment of benefits "relate to" the employee benefit plan. *Accord, Fitzgerald v. Codex Corp.*, 882 F.2d at 588.

B. The Decision Below Errs In Holding That ERISA's Preemption Provision Applies Only To Claims For Benefits, And Not To Claims For Wrongful Discharge

In reaching the contrary conclusion, the Supreme Court of Texas held (App., *infra*, at 5a n.3) that ERISA's preemption provision applies only to claims for benefits, and not to claims for wrongful discharge. It reasoned (*id.* (emphasis added in original)) that respondent "is *not* seeking lost *pension benefits* but is instead seeking lost future wages, mental anguish and punitive damages as a result of wrongful discharge." This reasoning is fallacious.

ERISA does not preempt only state law-based actions seeking benefits. It preempts any state law that "relates to" an employee benefit plan. As this Court's decisions evidence, a state law may "relate to" an employee benefit plan even though it seeks damages other than lost benefits. *See, e.g., Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987) (preemption of state common law action seeking punitive damages for improper processing of a disability benefits claim).

Moreover, a state law claim may "relate to" an employee benefit plan, and thus be preempted by ERISA, even though it is intended to regulate the terms of the employment relationship (and not the terms of the benefit plan itself). Just like Section 510 of ERISA, the state law claim would seek indirectly to protect employee benefit rights by directly regulating the employment relationship—*i.e.*, by prohibiting employment decisions that might otherwise defeat employee benefit rights under the plan. In other words, the state law claim would have the same substantive objective and effect as Section 510 of ERISA, and Section 510 is one of the critical substantive

components of ERISA that were supposed to preempt the field of employee benefits.[4]

Indeed, the fact that respondent is seeking state law remedies for what is essentially a Section 510 claim only reinforces the conclusion that the claim allowed by the court below must be preempted. Section 510 provides that its terms are to be enforced under the provisions of Section 502 of ERISA. *See* 29 U.S.C. § 1140. Section 502 sets forth a comprehensive enforcement scheme for actions covered by ERISA, and this Court has held that "varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress." *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 52. Thus, any attempt by the State of Texas to add to the remedies available under Section 502 for a claim relating to an interference with

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[4] The legislative history of ERISA confirms this conclusion. As this Court has noted, "[t]he bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 98. "The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language." *Id.* at 98. There is no basis in the legislative history for suggesting that, in so expanding the scope of the preemption clause, the Conference Committee intended to allow state regulation of specific subjects covered by ERISA—such as Section 510's coverage of actions that might "interfere" with the attainment of benefits under the plan. *Cf. United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977) (finding that the exemption for "involuntary retirement" in original Age Discrimination in Employment Act bill was implicitly embodied in subsequent amendment's broader exemption for "bona fide employee benefit plans"). On the contrary, the legislative history indicates that Congress viewed Section 510 as a critical substantive component of ERISA's protective scheme and, furthermore, that, with the narrow exceptions specified in the bill, the substantive and enforcement provisions of that scheme were intended to preempt the field of regulation. *See* 3 ERISA Legislative History 4597-98; *see also id.* at 4670 (remarks of Rep. Dent); *id.* at 4745-46 (remarks of Sen. Williams); *id.* at 4770-71 (remarks of Sen. Javits).

attainment of benefits—like a claim under Section 510—must be preempted. As the Court stated in *Pilot Life*, "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." 481 U.S. at 54.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 1990

APPENDIX

APPENDIX

SUPREME COURT OF TEXAS

No. C-7973

PERRY MCCLENDON,
Petitioner,
v.

INGERSOLL-RAND COMPANY, d/b/a INGERSOLL-RAND COMPANY CONSTRUCTION EQUIPMENT GROUP,
Respondent.

Oct. 18, 1989

Rehearing Denied Nov. 15, 1989

Michael Y. Saunders, John W. Tavormina, Houston, for petitioner.

William T. Little, Houston, for respondent.

SPEARS, Justice.

This is a suit for wrongful discharge. Perry McClendon sued his former employer, Ingersoll-Rand Company. McClendon alleged that he was discharged from his employment so that Ingersoll-Rand could escape its obligation to contribute to his pension fund. The trial court rendered summary judgment in favor of Ingersoll-Rand. The court of appeals affirmed. 757 S.W.2d 816 (1988). We reverse the judgment of the court of appeals and remand the cause to the trial court.

In August 1972, McClendon began employment with Ingersoll-Rand as a sales-person and distributor of con-

struction equipment. He was paid on a commission basis in accordance with the terms of a "Compensation Arrangement" that was to remain in effect through December 1982; however, this "compensation arrangement" did not specifically dictate the term of McClendon's employment.

In late 1979, Ingersoll-Rand transferred McClendon from San Antonio to Dallas so that he could develop a potentially lucrative market there. McClendon secured a substantial amount of business in Dallas, and McClendon's supervisor later testified that he was satisfied with McClendon's job performance. Nevertheless, Ingersoll-Rand fired McClendon on November 19, 1982. Ingersoll-Rand justified McClendon's termination by claiming that external economic factors mandated a work force reduction of *one* salesperson.

McClendon's termination from employment occurred after he had accumulated nine years and eight months of service to Ingersoll-Rand. Further, the termination occurred exactly four months prior to the vesting of McClendon's retirement and pension benefits, at which time Ingersoll-Rand would have been required to contribute to McClendon's pension fund.

In filing suit, McClendon alleged that Ingersoll-Rand breached its employment contract with him and breached its duty of good faith and fair dealing in connection with the employment relationship.[1] In addition, McClendon asserted a cause of action for wrongful discharge and alleged that Ingersoll-Rand had terminated him to escape its obligation to contribute to his pension fund[2] and to avoid paying him the commission from a particular sale.

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[1] Because we have decided this cause on other grounds, we need not reach the issues relating to the tort duty of good faith and fair dealing and we express no view on this matter.

[2] Although Ingersoll-Rand ultimately allowed McClendon's pension to vest, McClendon argues that such subsequent vesting does not retroactively reverse any bad faith conduct in which Ingersoll-Rand engaged when it terminated McClendon to avoid pension contributions. McClendon argues that the pension plan issue is relevant in order to explain the motivation behind Ingersoll-Rand's initial termination of McClendon.

At issue is whether McClendon's allegations state a cause of action under Texas law. Texas courts have traditionally followed the employment-at-will doctrine which allows that employment for an indefinite term may be ended at will and without cause. *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99 (1888); *Molder v. Southwestern Bell Tel. Co.*, 665 S.W.2d 175 (Tex.App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

Although this doctrine has been widely accepted, numerous exceptions and limitations have been placed on its application. For example, federal law prohibits the discharge of an employee because of age, race, religion, sex, color or national origin. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (1982 & Supp. 1985); Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1977). Federal law also prohibits a private employer from discharging an employee who exercises his rights under the Fair Labor Standards Act to minimum wage and overtime. 29 U.S.C. § 215(a)(3) (1977 & Supp.1982). Similarly, Texas has enacted various statutes that restrict an employer's discretion to terminate the employment relationship. *See, e.g.*, TEX.REV. CIV.STAT. art. 5207a (discharge based on union membership); TEX.CIV.PRAC. & REM.CODE § 122.001 (discharge because of jury service); TEX.REV.CIV.STAT. art. 8307c (discharge for filing a worker's compensation claim); TEX.GOV'T CODE § 431.006 (discharge because of active duty in the state military forces); TEX.REV.CIV.STAT. art. 5221k, § 5.01 (discharge based on race, color, handicap, religion, sex, national origin or age).

In addition to state and federal legislation, courts have developed various common-law restraints on the doctrine of employment-at-will. In *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex.1985), this court recognized a cause of action for a plaintiff alleging that he was discharged for refusing to perform an illegal act. In creating this exception to the employment-at-will doctrine, we considered the changes in American society and in the employer/employee relationship over the course of the past century, and we held that public policy, as expressed in both state and federal law, required such an exception. *See also Petermann v. International Brotherhood of Teamsters, Local 396*, 174 Cal. App.2d 184, 344 P.2d 25 (1959) (recognizing public policy exception to employment-at-will doctrine in case of employee alleging that he was wrongfully discharged for refusing to perjure himself before a legislative investigative committee).

Numerous other states have accepted the principle that public policy can limit an employer's power to discharge at-will employees. *See Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353 (1978); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Harless v. First Nat'l Bank*, 162 W.Va. 116, 246 S.E.2d 270 (1978). More specifically, the Eastern District of New York has recognized a cause of action for wrongful discharge when an employee alleges that he was terminated to deprive him of pension benefits. *Hovey v. Lutheran Medical Center*, 516 F.Supp. 554 (E.D.N.Y.1981). The court expressly recognized the public policy associated with the preservation of pension plans for both governmental and private employees. *Id.* at 558; *see also Savodnik v. Korvettes, Inc.*, 488 F.Supp. 822, 826 (E.D.N.Y. 1980) (recognizing strong public policy "favoring the protection of integrity in pension plans" and allowing

wrongful discharge cause of action for plaintiff who alleged that employer fired him to avoid paying pension benefits).

In determining whether McClendon has stated a cause of action under Texas law, we recognize that the state has an interest in protecting employees' interests in pension plans. *Cf.* TEX.REV.CIV.STAT., Title 110B (Vernon 1988) (reflecting state's interest in preserving pension plans for public employees). Also, the Employee Retirement Income Security Act (ERISA) makes it unlawful for any person to discharge, fine, suspend or discriminate against any employee for the purpose of interfering with that employee's potential rights under a pension plan. 29 U.S.C. § 1140. The very passage of ERISA demonstrates the great significance attached to income security for retirement purposes.

We hold that public policy favors the protection of integrity in pension plans and requires in this case an exception to the employment-at-will doctrine. This exception allows recovery when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund.[3]

We reverse the judgment of the court of appeals and remand this cause to the trial court for trial.

COOK, J., files a dissenting opinion in which PHILLIPS, C.J., and HECHT, J., join.

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[3] Two federal district court cases have held that a claim for wrongful discharge in order to avoid the payment of pension funds is preempted by ERISA. *Pratt v. Delta Air Lines, Inc.*, 675 F.Supp. 991 (D.Md.1987); *Cahall v. Westinghouse Electric Corp.*, 644 F.Supp. 806 (E.D.Penn.1986). These cases, however, can be distinguished from the present action because here the plaintiff acknowledged in his brief to the court of appeals that he is *not* seeking lost *pension benefits* but is instead seeking future wages, mental anguish and punitive damages as a result of the wrongful discharge.

GONZALEZ, J., files a dissenting opinion.

COOK, Justice, dissenting.

I dissent. The central issue in this case, as argued and briefed by the parties, concerns whether the duty or implied covenant of good faith and fair dealing exists in the context of an employment-at-will relationship. The majority opinion not only fails to address this issue, but also creates a state cause of action based on conduct already prohibited by federal statute. Given the adverse impact that the majority opinion will have upon our court systems, I would affirm the judgment of the court of appeals.

I. ERISA

The court reminds us that § 510 of the Employee Retirement Income Security Act (ERISA) makes it unlawful for any person to interfere intentionally with impending pension eligibility. 29 U.S.C. § 1140 (1985). According to the court, ERISA demonstrates the great significance attached to income security for retirement.

I agree. ERISA's § 510 is indeed significant, so significant that it confers upon employees a federal version of the cause of action created by this court, confines litigation of the federal cause of action to the federal courts, and preempts the state cause of action.

Section 510 of ERISA expressly states that it is "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan." *Id.* The case law has interpreted § 510 to delineate a cause of action that applies in precisely the same situations as the one considered today. *See, e.g., Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987).

Congress provided for the enforcement of § 510 in § 502, which comprises the statute's civil enforcement provisions. 29 U.S.C. at § 1132. Section 502(e)(1) confines litigation of certain claims to federal court. *Id.* at § 1132(a)(3). One of those claims is the § 510 action. *Id.*; 29 U.S.C. at § 1140. Consequently, an ERISA claimant who sues for termination resulting from intent to avoid pension responsibility may sue only in federal court.

The provisions of § 510 do not initially appear to affect the law set out today. It is, after all, possible for state and federal law to address the same problem. Section 514 of ERISA, however, makes it clear that duplication of effort in this area of the law is simply not allowed. 29 U.S.C. at § 1144. Under § 514(a) all provisions of the subchapter in which § 510 is contained preempt state laws that "relate to" employee benefit plans. *Id.* at § 1144(a). In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 57, 107 S.Ct. 1549, 1558, 95 L.Ed.2d 39 (1987), the United States Supreme Court decided that § 514 superseded a state common law that related to an employee benefit plan. The powerful effect of § 514(a) was repeatedly emphasized by the Court, which expressed its unanimous conviction that Congress intended to establish pension plan regulation as an exclusively federal concern. *Id.* at 45-47, 52-56, 107 S.Ct. at 1551-53, 1555-57.

There can be no doubt that the law created today by this court relates to a pension plan and directly conflicts with the specific provisions of § 510 establishing a federal cause of action under ERISA. Consequently, that section preempts our new law through § 514(a). *See Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987). Furthermore, because preemption of the claim at issue leaves a plaintiff with a cause of action that can be litigated only in federal court, ERISA preempts the forum as well as cause of action. Arguably, this simul-

taneous affect on forum and claim may deprive the state court of the power to adjudicate. *See International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986).

Notwithstanding the power of this set of ERISA provisions, a plaintiff might still rely on our decision today to bring our version of the claim for pension-related wrongful discharge in a state court. The plaintiff could purge ERISA from the face of the petition and rely on the well-pleaded complaint rule to deter removal of the case to federal court. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Under that rule, which states that a petition that describes only state claims on its face prevents removal by a defendant to federal court, a defendant would be left with nothing better than the dubious opportunity to convince a state court that the pertinent ERISA provisions deprive the state court of subject matter jurisdiction.

This procedural block to removal, however, no longer deters the ERISA § 502(a) defendant. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 67, 107 S.Ct. 1542, 1548, 95 L.Ed.2d 55 (1987), the United States Supreme Court created an exception to the well-pleaded complaint rule in deciding that these defendants may remove. Furthermore, the fact that a state court has no jurisdiction over the claim to begin with, which once prohibited removal, restrains defendants no longer. 28 U.S.C. § 1441 (e) (Supp.1989). It is clear, therefore, that defendants faced with a petition that states no more than our new cause of action may remove to federal court, raise the defense of preemption, and replace the common law claim.

By creating today's exception to the employment at will doctrine, the court misleads employees by providing them with an imaginary claim. ERISA, on the other hand, provides them with a real and enforceable claim that they may bring in federal court and at the same

time supersedes the claim manufactured today. I believe that ERISA's provisions make it doubtful that a state court even has power to adjudicate the new cause of action. In any case, astute defendants need not wait to find out. They need only remove to federal court and raise a defense of preemption. I sincerely regret the confusion and prolonged litigation we have thrust upon employers and employees in their efforts to resolve disputes concerning their pension plans.

II. SUMMARY JUDGMENT

An equally profound implication of the majority opinion concerns the availability of summary judgment proceedings in wrongful discharge cases. In its motion for summary judgment, the general supervisor for Ingersoll-Rand submitted a sworn affidavit stating that McClendon's termination arose as part of a company-wide reduction of the workforce in response to adverse economic conditions. The response by McClendon noted that his termination occurred four months prior to the vesting of his pension, at which time the company would have been required to contribute $3000 to his employee pension fund. McClendon also relied on comments made by his supervisor, who stated his general satisfaction with McClendon's job performance. This evidence, according to the holding of the majority, is sufficient to raise a fact issue on whether the employer terminated the employee in part to escape contributions to the employee pension fund.

This holding, however, raises a question that remains unanswered: when will the evidence presented on motion for summary judgment be insufficient to raise an issue of fact on the employer's intent? The court today finds a fact question under the evidence presented in this case, a case in which the termination preceded the vesting of the benefits by four months; would a fact question also be raised when the termination preceded the vesting by

five months or nine years and eleven months? The majority opinion unfortunately fails to provide trial courts and litigants with the answer to this crucial question. In the absence of an answer, an employee is presumably guaranteed a jury trial by merely alleging that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund.

This approach undercuts the very purpose of summary judgment proceedings, which are designed to eliminate patently unmeritorious claims and untenable defenses. *See In re Estate of Price*, 375 S.W.2d 900, 904 (Tex. 1964). The provision for summary judgment proceedings serves the critical functions of eliminating baseless claims from congested trial dockets and saving the unwarranted expenses involved in trying such actions. This concern has likewise been recognized in the context of wrongful discharge actions brought pursuant to ERISA. For example, an employee must establish more than the mere fact that the termination of his employment resulted in a monetary savings to his employer; otherwise, an ERISA violation would occur every time an employer terminated a vested employee. *See Nixon v. Celotex Corp.*, 693 F.Supp. 547, 555 (W.D.Mich.1988); *Donohue v. Custom Management Corp.*, 634 F.Supp. 1190, 1197 (W.D.Pa. 1986).

Herein lies the crux of my concern with the majority opinion. By permitting tort damages in actions based on the employer's desire to escape an obligation to contribute to pension funds and yet failing to deliniate those circumstances under which a summary judgment would be appropriate, the court has unduly chilled an employer's right to terminate an at-will employee with or without cause. No longer can the vast number of employers rely on a valid reason in terminating employees without a jury's scrutinization of their decisions and the possible imposition of tort damages. By terminating employees

at any point prior to their retirement, employers need only wait for the court summons to explain and justify their decisions to a jury. The proverbial "floodgates of litigation" have never been a more appropriate concern than in the decision reached by this court today. For this reason, I strongly oppose the majority's decision to place unwarranted limitations on the employment-at-will doctrine.

III. BREACH OF GOOD FAITH AND FAIR DEALING

In his arguments presented to this court, McClendon seeks to hold Ingersoll-Rand to the duty of good faith and fair dealing in the context of their former employment relationship. Despite his characterization of this duty as an "implied covenant," which suggests an action sounding in contract, McClendon also seeks the recovery of tort damages such as mental anguish, emotional distress, and punitive damages. McClendon based his claim for tort damages on *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex.1987), a case in which this court recognized a duty on the part of insurers to deal fairly and in good faith with their insureds. This duty arises from the special relationship that exists in the insurance context due to an unequal bargaining power between the parties and the special nature of such contracts. *Arnold*, 725 S.W.2d at 167. While implied covenants are contractual in nature, the duty of good faith and fair dealing is imposed by law in insurance relationships. *Chitsey v. National Lloyds Ins. Co.*, 738 S.W.2d 641, 643 n. 1 (Tex.1987).

Employers, however, do not generally receive economic benefits by terminating productive employees and thus do not require disincentives to terminate employees in addition to those already imposed by law. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 765 P.2d 373, 396, 254 Cal.Rptr. 211, 234 (1988); Epstein, *In Defense of*

the Contract at Will, 51 U.CHI.REV. 947, 973-74 (1984) (hereinafter Epstein, *Contract at Will*). Further, employment relationships do not possess an inequality in bargaining power as a universal characteristic and thus cannot be analogized to insurance relationships on this basis. *See* Epstein, *Contract at Will*, 51 U.CHI.L.REV. at 973-74; *see also* Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN.L.REV. 153, 165-67 (1981) (hereinafter Note, *Defining Torts*).

The employment relationship is also distinguishable on the basis of the duties owed by the respective parties under the contract. Employers, unlike insurers, do not owe similar fiduciary duties to their employees, who are themselves agents of the employers and are obligated to act in their employers' interests. *Foley*, 765 P.2d at 395, 254 Cal.Rptr. at 233, (citing Note, *Defining Torts*, 34 STAN.L.REV. at 165-67). The duties owed in an employment-at-will relationship are instead premised on the mutuality of obligations existing between the employee and employer, both of whom are able to terminate the relationship with or without cause. I would therefore decline to extend the duty articulated in *Arnold* and its imposition of tort damages to employment-at-will relationships. There should not be a tort cause of action for a breach of good faith and fair dealing in an employment-at-will relationship. I would thus follow the majority of jurisdictions that have not allowed the recovery of tort damages for a breach of the duty or implied covenant of good faith and fair dealing in at-will employment relationships.

Additionally, McClendon is not entitled to recover contract damages under an implied covenant of good faith and fair dealing in this case. According to McClendon, the company terminated his employment to avoid paying any commissions that he would have earned from future sales. The contractual right to these commissions was set forth in a written compensation agreement, which

expressly addressed the commissions to be earned by McClendon in the event that Ingersoll-Rand terminated his employment for any reason. McClendon has not alleged that the company owed any commissions that had already been earned under the terms of this agreement at the time of his termination. Instead, McClendon apparently seeks the recovery of commissions that would have eventually been earned from future sales.

McClendon and Ingersoll-Rand contemplated and expressly set forth the manner by which the commissions would have been earned in the event of a termination. Under the express terms of this agreement, the parties did not create a right on behalf of McClendon to earn potential commissions. Thus, the covenant of good faith and fair dealing cannot be implied in this instance to set aside the express terms of their agreement and permit McClendon's recovery of potential commissions. *See Willis v. Champlain Cable Corp.*, 109 Wash.2d 747, 759, 748 P.2d 621, 627 (1988).

McClendon further alleges that Ingersoll-Rand terminated his employment in order to prevent the vesting of his retirement and pension benefits, thereby relieving the company of its required contribution to his pension fund. On motion for summary judgment, however, Ingersoll-Rand presented an uncontroverted affidavit stating that McClendon's benefits have in fact vested. Because McClendon has received his retirement and pension benefits, the trial court properly rendered summary judgment with respect to the recovery of these contractual benefits.

I would accordingly affirm the judgment of the court of appeals.

PHILLIPS, C.J., and HECHT, J., joint in this dissent.

GONZALEZ, Justice, dissenting.

I join with Justice Cook's conclusions that this cause of action is preempted by ERISA, and that it will be

very difficult, if not impossible, to filter out meritless cases by summary judgment as a result of today's opinion. I write, however, to emphasize what the court's decision does not do. It does not extend the duty of good faith and fair dealing to the employment-at-will doctrine; and it does not decide what damages are available for this new cause of action. I further note that the federal authority that the court finds persuasive is questionable.

By point of error, McClendon invited us to engraft the duty of good faith and fair dealing as enunciated in *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex.1987) on to the employment-at-will doctrine.[1] We refused.

In responding to this point of error, the court instead created a narrow "exception to the employment-at-will doctrine." In creating this exception, the court fails to give the bench and bar clear guidance as to whether this "exception" creates a new cause of action sounding in tort or whether it merely eliminates the doctrine as a contractual defense. *See Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 335 N.W.2d 834 (1983); *see generally*, Annotation, *Discharge of At-Will Employee*, 12 A.L.R. 4th 544 (1982).

In an attempt to avoid the preemptive effect of ERISA, the court observes that the plaintiff here is "seeking lost future wages, mental anguish and punitive damages" as a result of the alleged wrongful discharge. P. 71 at n. 3. The court, however, does not resolve whether the plaintiff is entitled to all damages pleaded. This is essentially an open question. In *Azar Nut Co. v. Caille*, 734 S.W.2d 667 (Tex.1987), we allowed punitive damages, but this was

[1] We granted McClendon's application for writ of error on points two and four. Point four contended: "The Court of Appeals erred when it failed to recognize that a covenant of good faith and fair dealing should be applied to Respondent's employment relationship with Petitioner."

in a statutorily-created cause of action for which the right to exemplary damages could reasonably be inferred from the language of the statute. In *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex.1985), we recognized a common law exception but did not decide the question of available damages. *Id.* at 736 (Kilgarlin, J., concurring). As a general rule, the damages available for common law wrongful termination are contractual in nature. *Greater Fort Worth and Tarrant County Community Action Agency v. Mims*, 627 S.W.2d 149 (Tex.1982).

Furthermore, the court's reliance upon two federal district court cases, *Hovey v. Lutheran Medical Center*, 516 F.Supp. 554 (E.D.N.Y.1981) and *Savodnik v. Korvettes, Inc.*, 488 F.Supp. 822 (E.D.N.Y.1980) is misplaced. Those two courts created a public policy exception to the employment-at-will doctrine that another New York federal district court refused to follow, stating:

> [A] change in New York's law such as the recognition of a tort which for the last 90 years has not been recognized by the New York Court of Appeals, should not be brought about by a federal district court deciding issues of state law solely by virtue of the diversity of citizenship of the parties before it (citations omitted). [H]irings for an unspecified or indefinite period are freely terminable at the will of either party.

Salanger v. U.S. Air, 560 F.Supp. 202, 205 (N.D.N.Y. 1983). Additionally, one New York intermediate court of appeals considered and refused to follow the same cases the court now finds persuasive:

> We find no case in this state wherein a cause of action for abusive discharge based on a violation of public policy has been sustained and we are unable to subscribe to such a cause of action in light of the well-established principle that an at-will employee may be discharged at any time without cause.

Pavolini v. Bard Air Corp., 88 A.D.2d 714, 715, 451 N.Y.S.2d 288, 289 (1982). The highest court of the State of New York has declined opportunities to carve out exceptions to the employment-at-will doctrine. *See Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982); *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); *see also Salanger*, 560 F.Supp. at 205; *Patrowich v. Chemical Bank*, 98 A.D.2d 318, 470 N.Y.S.2d 599 (1984).

For the above reasons, I dissent.

COURT OF APPEALS OF TEXAS
HOUSTON (14TH DIST.)

No. C14-87-768-CV

PERRY MCCLENDON,
Appellant,

v.

INGERSOLL-RAND CO.,
Appellee.

July 21, 1988

Rehearing Denied Aug. 18, 1988

Michael Y. Saunders, John W. Tavormina, Houston, for appellant.

William T. Little, Mary W. Costley, Houston, for appellee.

Before JUNELL, SEARS and CANNON, JJ.

OPINION

JUNELL, Justice.

This is a wrongful discharge case. Appellant Perry McClendon sued his former employer, Ingersoll-Rand Co., after he was released from his position as a salesman. He alleged that his employment contract was not terminable at will. He also alleged that appellee had breached an implied covenant of good faith and fair dealing, and that appellee intentionally inflicted emotional distress upon him. The trial court rendered summary judgment against appellant. We affirm.

Appellee had employed appellant for nine years and eight months at the time of the termination. Appellant stated in his petition that retirement benefits would have vested to his benefit if he had continued in appellee's employ for four more months. Furthermore, he alleged that he had laid the ground work for a large transaction with Trinity Equipment, but that the wrongful discharge deprived him of commissions from that sale. In support of his claims that the employment relationship was not terminable at will, he points to a series of writings which govern the calculation of such commissions.

At the time of the termination (Nov. 19, 1982) appellant and his employer determined commissions by reference to a "Compensation Arrangement." Each year the employer promulgated guidelines in such a document which fixed the sales quota, expense budget, and commission schedules for all sales personnel. The parties disagree over whether the compensation arrangement limited their ability to end the relationship at will. Although it does not address the issue directly, the 1982 version of the "arrangement" provides in part:

> TERMINATIONS
>
> When the employment by I-R of a commissioned Distributor Representative terminates for any reason before the equipment on which he has been recommended for commission has been invoiced, he is to be paid one-half (1/2) commission on the sales credit when the equipment is invoiced. In the determination of commission payable under this paragraph, only firm orders on which the commissioned Distributor Representative is recommended for commission and which are received up to the close of the last full working day of the Distributor Representative's actual employment shall be included, provided such orders are accepted by the Company. Any monthly commission on Rental Equipment ceases

> at the time of termination. Only equipment invoiced within ninety (90) days from termination date will qualify for commission.
>
> From the effective date of termination there will be a thirty (30) day period in which the Distributor Representative will be required to furnish I-R with all commissionable sales due him. No commission request beyond this thirty (30) day period will be honored.
>
> The Special Commission Schedule for attaining quotas does not apply if termination occurs prior to the end of the calendar year.

The document ends by noting that it is subject to change by appellee at any time, and that in any event it expires at the end of 1982. Appellant signed the document, as did a representative of appellee.

The first point of error asserts that the written compensation agreement barred application of the "at will" employment doctrine. The at will rule, as usually formulated, allows either party to an employment relationship to dissolve that relationship at any time and for any reason (or no reason at all). This customary statement of the rule constitutes a serious misrepresentation of the law, however, because employers must abide by a host of restrictions on their discretion.

Federal legislation prohibits the firing of any employee for reasons of race, color, religion, sex, or national origin. Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). Federal law likewise bars arbitrary discharge based on age. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623. The Texas Commission on Human Rights Act echoes these restrictions and additionally outlaws discharge based on handicap. TEX.REV.CIV.STAT. art. 5221k § 5.01. Retaliatory discharge is illegal in a number of circumstances. *See, e.g.*, Judiciary and Judicial Procedure Act, 28 U.S.C. § 1875 (jury service); Na-

tional Labor Relations Act, 29 U.S.C. § 158 (union activity); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660 (reporting workplace hazards); TEX.REV. CIV.STAT. art. 8307c (filing a worker's compensation claim); *see generally* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 Baylor L.Rev. 667, 669-70 (1984) (listing other statutory limits).

Texas common law similarly curtails an employer's ability to terminate an employee when the sole reason for termination is the employee's refusal to commit an illegal act. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985).

However, appellant rests his argument not on statutory or common law bases, but on the compensation arrangement. Ingersoll-Rand convinced the trial court that the written document merely stated company policy in the area of sales commissions, and we agree. That the writing calls itself an agreement is in no way a hindrance to dissolution of the employment relation. Indeed, the document's termination paragraphs plainly contemplate that termination may occur at any time. Our conclusion is bolstered by the provision that the "agreement is subject to change, at any time, by the Company without prior written notice."

Appellant relies on *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403 (Tex.App.—Beaumont 1987, writ ref'd, n.r.e.) for the proposition that an employer's right to terminate an employee is limited when a writing so provides "*in a meaningful and special way.*" *Id.* at 406 (emphasis in original). Rather than engage in a semantic dispute over what the Beaumont Court meant, we regard the quoted phrase simply as a rhetorical flourish on the more pedestrian expression of the rule in the case it cited, *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 127 (Tex.App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). *Webber* states that employment is at will

absent a writing which "specifically" says otherwise. The writing at hand merely regulates sales commissions. Point of error one is overruled.

Point of error two claims that the compensation agreement is ambiguous. Although appellant maintains in his reply brief that he raised this argument below, his response to the motion for summary judgment contains no mention of ambiguity. The only conceivable reference to ambiguity appears in the response at paragraph VI, entitled "Burden of Proof." That paragraph reminds the court that Ingersoll-Rand assumes the burden of proof on all elements of its cause of action, including a showing that the "provision in question is capable of only one meaning or interpretation." The next and final sentence states that "Defendants have not met this burden, and Defendants' Motion for Summary Judgment must be denied."

This passing comment does not meet the requirement that a response *expressly present* the issue to the trial court. TEX.R.CIV.P. 166a(c); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671 (Tex. 1979). On the contrary, this is no more than a challenge to the legal sufficiency of the movant's proof, a challenge which is available on appeal in any event, regardless of whether a response has been filed. Appellant's third point of error raises just such a challenge. We overrule the second point of error.

The third point of error asserts that fact issues exist concerning interpretation of the compensation agreement. We glean no such fact issues from either of the depositions on file; neither does the instrument itself admit of any interpretation even remotely supportive of appellant's position. The third point of error is overruled.

In his fourth point of error, appellant contends that he substantially performed in regard to the Trinity Equipment deal. This contention does not appear in his

response to the motion for summary judgment, although Trinity Equipment is mentioned in paragraph III, entitled "Plaintiff Was Terminated Without Good Cause." (We will address the good cause issue in due course). Appellant's reference to the Trinity Equipment deal can only be read as fortifying his argument that good cause was lacking. Rule 166a(c) does not permit presentation of the substantial performance argument on appeal. We overrule the fourth point of error.

Point of error five squarely raises the question whether the parties incorporated a good cause limitation onto Ingersoll-Rand's otherwise unfettered discretion to terminate the relationship. Appellant presented this issue below, despite appellee's claims to the contrary, in paragraph III of his response. Appellant characterizes his employment relationship as containing an "implied in fact" agreement that he not be released except for good cause. This he calls an exception to the at will rule. As evidence of this limitation he points out that he relocated himself and his family to Dallas, implicitly relying on Ingesoll-Rand's willingness to continue his employment.

As to the existence of an implied in fact agreement, both sides' arguments cast more heat than light. The question is not whether such an "exception" in the contract is real or illusory; rather the question is simply, what is the scope of the contract? The contract of employment was never reduced to writing, contained no specification of duration and lacked any limitation on the parties' abilities to go their separate ways. Ingersoll-Rand presented affidavit testimony which corroborates our reading of the compensation agreement. Accordingly, the common law rule applies. *See East Line & R.R. Ry. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99 (1888). The fifth point of error is overruled.

In point of error six appellant asks us to create an implied covenant of good faith and fair dealing. The starting point in our analysis is Supreme Court precedent. As recently as five years ago the Supreme Court expressly rejected an invitation to recognize such a rule. *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983). Appellant regards *English*, however, as incapable of survival without extraordinary means, in view of *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987). In the latter case the Court imposed such a covenant on insurers because of a special relationship between insurers and their insureds. Nevertheless, *Arnold* furnishes us no warrant for renouncing a binding precedent and fashioning a new rule to the contrary.

If we were to recogize the employer-employee relationship as "special," that would be tantamount to putting every commercial contract under the umbrella of *Arnold:* vendor-purchaser, lessor-lessee, lender-borrower. Such an extension would undermine the very foundation of *Arnold* by denying that an insurance relationship is deserving of any special protection: it would in effect repudiate the Court's rationale to confuse the exceptional with the everyday.

Furthermore, the Supreme Court has gone on record as disapproving encumbrances on free movement in the workplace. *See Bergman v. Norris of Houston*, 734 S.W.2d 673 (Tex. 1987); *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987). An employee is as free to leave the relationship as an employer in a competitive environment: "it is but a normal effect of a free market economy." *Hill v. Mobile*, at 172. *See also* Tex.Const. art. I, § 26.

Finally, as discussed earlier, there is no want of legislation which restricts an employer's ability to dissolve an employment contract. It would be impertinent for us to arrogate to ourselves the right to pass additional laws under the guise of deciding cases. TEX. CONST. art. II, § 1. As Chief Justice Guittard said in a wrongful discharge case virtually identical to this one, "In our system of constitutional government, the primary agency to de-

clare the policy of the state is the legislature. Although legislative processes may be imperfect, appeals for judicial legislation based on legislative inaction betray a loss of faith in democratic government." *Watson v. Zep Mfg. Co.*, 582 S.W.2d 178, 180 (Tex.Civ.App.—Dallas 1979, writ ref'd n.r.e.); *accord Molder v. Southwestern Bell Tel. Co.*, 665 S.W.2d 175, 177 (Tex.App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) ("the legislature is the appropriate agency for effecting a change in policy regarding the employer-employee relationship."). To say that the at will doctrine—a misnomer to begin with—was judicially created and can therefore be judicially abolished is to misstate history. The at will doctrine was not generated *ex nihilo* in 1888 against a backdrop of some contrary legal regime. *See* Tex.Civ.Prac. & Rem. Code § 5.001 (adopting the common law of England as the rule of decision when no local source can be found); Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 Baylor L.Rev. 667, 667-68 (1984) (tracing the history of the rule back to England). The sixth point of error is overruled.

The final point of error assigns error to the adverse summary judgment on appellant's claim of intentional infliction of emotional distress. The summary judgment proof establishes beyond dispute that the discharge of appellant was neither extreme nor outrageous. (Indeed, appellant incorrectly concluded that being discharged before ten years of service would prevent him from collecting certain benefits. He was in fact never denied those benefits). Ingersoll-Rand did nothing more than react to an economic downturn by reducing its sales force. Such conduct is in no way actionable. The seventh point of error is overruled.

The judgment is affirmed.

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON,
Plaintiff,
vs.

INGERSOLL-RAND CO. d/b/a INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP,
Defendant.

[July 31, 1987]

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BE IT REMEMBERED that on the 27th day of July, 1987, the Motion for Summary Judgment filed in this cause pursuant to Rule 166A of the Texas Rules of Civil Procedure by INGERSOLL-RAND COMPANY, d/b/a INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP, Defendant. Proper notice of the hearing on this Motion for Summary Judgment was provided to opposing counsel. After considering the Defendant's Motion and the Summary Judgment evidence submitted in support thereof, after reviewing the Plaintiff's Response to this Motion for Summary Judgment and after entertaining argument of counsel, this Court is of the opinion that the Defendant's Motion is good and should be granted as hereinafter provided. Accordingly, it is hereby

ORDERED that the Defendant's Motion for Summary Judgment filed in this cause pursuant to Rule 166A of

the Texas Rules of Civil Procedure is hereby GRANTED in all respects. Accordingly, it is also

ORDERED, ADJUDGED and DECREED that PERRY McCLENDON, Plaintiff, take nothing by reason of his lawsuit against INGERSOLL-RAND COMPANY d/b/a INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP, Defendant. Further, that said Defendant shall so forth with its costs to be paid by the Plaintiff herein, for which let execution issue.

SIGNED on this the 31 day of of July, 1987.

/s/ [Illegible]
Judge Presiding

Approved as to form and content:

GILPIN, POHL & BENNETT

By: /s/ William T. Little
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SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
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John T. Adams, Clerk

November 15, 1989

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RE: Case No. C-7973

STYLE: PERRY MCCLENDON
v. INGERSOLL-RAND COMPANY, d/b/a INGERSOLL-RAND COMPANY

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

JOHN T. ADAMS
Clerk

By /s/ [Illegible]
Deputy

FOURTEENTH COURT OF APPEALS
1307 San Farinto, 11th Floor
Houston, Texas 77002

August 18, 1988

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RE: Case No. 14-87-00768-CV
Trial Court Case No. 84-44080

STYLE: McCLENDON, PERRY
v. INGERSOLL-RAND COMPANY

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, September 19, 1988.

Respectfully yours,

MARY JANE SMART
Clerk

/s/ Charlene Mitchell
Deputy